1965

State of Utah, By and Through Its Road Commission v. Neuman C. Petty and Irev A G. Petty, His Wife : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Appellant,

vs.

NEUMAN C. PETTY and IREVA G. PETTY, his wife,
Defendants and Respondents.

Case No. 10354

REPLY BRIEF OF APPELLANT

**Interlocutory Appeal from an Order of the Third District Court for Salt Lake County
Honorable Marcellus K. Snow, Judge**

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STATEMENT FOR REASON FOR REPLY BRIEF

The appellant submits the following reply brief to further clarify the issues between the parties and to bring to the court's attention precedent discovered subsequent to the filing of the original brief.

POINT I.

THE TRIAL COURT ERRED IN ORDERING APPELLANT TO ANSWER RESPONDENTS' INTERROGATORIES WITH GREATER PARTICULARITY.

The respondents have cited in their brief federal authority and a decision from the Supreme Court of California to the effect that discovery of the appellant's appraiser valuations of the property being taken by the appellant is proper. In answer to the federal authorities, it should be noted that there is federal authority cited in the appellant's brief which is contrary to the cases cited in the respondents' brief. However, apart from the split in the federal rule, it should be noted that Rule 30(b) of the Utah Rules of Civil Procedure departs from the federal rule by providing that the court "shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, or agent in anticipation of litigation or in the preparation for trial, unless satisfied the denial of production or inspection will unfairly prejudice the party seeking the production or inspection.***" Consequently, the federal cases cited by the respondents are unrelated to the specific language applicable under the Utah Rules of Civil Procedure. Further, in the Compilers' Notes, Rule 30(b), Utah Rules of Civil Procedure (Vol. 9, p. 559, Utah Code Annotated, 1953), it is noted:

"*** In its report, the Committee, after discussing the various cases which had determined that writings obtained or prepared by a party, his attorneys, agents or insurers in anticipation of litigation or in preparation for trial were subject to discovery and other cases to the effect that such matter was privileged, concluded that an amendment to Rule 30(b) was desirable. The amendment 'while placing the burden on the person seeking the discovery of the writing to demonstrate the necessity therefor, states a test of whether denial of the production or inspection sought by the party "will unfairly prejudice" him in "preparing his claim or defense" or will cause him "undue hardship or injustice." This gives the court a guide in determining whether inquiry may justly be made. Tests such as whether the examination constitutes a "fishing expedition," "penalizes the diligent," puts a "premium on laziness," or is subject to a broad rule of privilege protecting all matter gathered or prepared by or for an attorney, are rejected. A client's privilege of free communication with his attorney is protected in that production or inspection is not permitted as to any part of a writing reflecting the attorney's legal thinking—that is, his "mental impressions, conclusions, opinions, or legal theories." *Parties who have retained expert witnesses at their own expense are also protected* ***." (Emphasis added.)

The appellant's position is that the discovery should not be allowed on four grounds: (1) attorney-client privilege, (2) work product of the attorney, (3) unfairness, and (4) the interrogatories in part sought legal conclusions from the State. None of the cases cited

by the respondent cover the work product issue under rules or statutes similar to that existing in Utah, nor do they consider the question of the legal conclusionary status of the request for information. Respondent seeks to rely upon *Oceanside Union School District of San Diego County v. Superior Court of San Diego County*, 23 Cal. Rep. 375, 373 P.2d 439 (1962). That case considered only the attorney-client privilege and did not consider the work product argument. Further, the California Code of Civil Procedure does not contain provisions similar to Rule 30(b) of the Utah Rules of Civil Procedure. It is submitted that the better-reasoned approach is that contained in *Rust v. Roberts*, 171 Cal. App.2d 772, 341 P.2d 46 (1959).

The same issue now before the court was before the Oregon Supreme Court in *Brink v. Multnomah County*, 224 Ore. 507, 356 P.2d 536 (1960). There, the Oregon Supreme Court held that the attorney-client privilege prohibited discovery of an appraiser employed by the condemnor. The court also indicated:

> "It is possible that plaintiffs' demand for the information contained in its report could have been resisted by defendant's counsel on the ground that it was a part of his 'work-product' arising out of his preparation for trial. Hickman v. Taylor, 1947, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, instructive opinion below reported in 3 Cir., 1945, 153 F.2d 212, 223; Sparks Co. v. Huber Baking Co., 1955, 10 Terry 267, 49 Del. 267, 114 A.2d 657; McCormick, Evidence, § 100 (1954)."

The Oregon Supreme Court applied the attorney-client privilege, citing *McCarthy v. Palmer,* 29 F.Supp. 585 (D.C.E.D.N.Y. 1939), that to make use of such preparation would be to "penalize the diligent and place a premium on laziness." The court also noted a similar result in the case of *Lewis v. United Airlines Transport Corporation,* 32 F. Supp. 21 (D.C.W.D. Penn. 1940).

In *State Highway Department v.* 62.96747 *Acres of Land,* 193 A.2d 799 (Del. 1963), the Delaware court ruled that a party could not use the expert appraisers of the State or discover their testimony. In doing so, the court thoroughly considered precedent from California. The court noted that it was difficult to reconcile the decisions of the California Supreme Court. It further noted that there was substantial inaccuracy in much of the legal research of the California Court, and inconsistency among the California authorities. The Delaware court approved the opinion of the Oregon Supreme Court noted above, rejected the California authorities, and indicated that the attorney-client privilege was applicable to appraisers hired by the State Highway Department.

It is apparent that the better rule is to recognize that experts expressly employed by the Utah State Department of Highways are employed for the purpose of litigation, and appraisals are communicated to the State's attorneys for the sole purpose of litigation. By keeping the appraisals of the parties to themselves, justice is served, and settlement of suits is encouraged,

since a party not knowing the State's appraisals will not be in a position to shop for higher appraisals, but will be forced to make an objective appraisal of his position based on his own determination of value. If discovery were allowed, it would produce "appraiser shopping." A party would be inclined to discover the State's appraisals and then seek out higher appraisals merely for the purpose of claiming a greater damage. The traditional condemnation practice has been to exclude discovery, and it does not appear to have prejudiced the community. In the case of a clear showing that the condemnee would be prejudiced, a court might, in its discretion, allow some discovery, but blanket discovery which was sought in this case and which, in part, called for the legal conclusions of the State is improper.

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